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No. 1147

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

PETITION NOT Printed

SAM POLUR,

Petitioner-Appellant,

against

BERNARD BOTEIN, Individually and as "Chairman" of the "Judicial Screening Committee" and as Presiding Justice of the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department, et al.,

Respondents-Appellees.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Jurisdiction

The order of the New York Court of Appeals granting respondents' motion to dismiss petitioner's appeal was entered and filed on December 11, 1968. The petition for a writ of certiorari was served upon respondents on March 7, 1969. A supplement to the petition was served upon respondents on March 11, 1969.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

Questions Presented

The petition for certiorari involves two questions:

(1) Whether the questions raised by petitioner's allegations have not become moot?

(2) Whether petitioner's allegations are not so frivolous that they fail to raise any substantial federal question?

In its memorandum decision dated December 11, 1968, the New York Court of Appeals held that the appeal presented no substantial constitutional question and, in any event, was moot.

Statement of the Proceedings

Petitioner, appearing *pro se,* brought a proceeding in the New York State courts attacking, on a variety of grounds, the "Judicial Screening Committee" announced by Mr. Justice Botein, at that time Presiding Justice of the Appellate Division, First Department, of the Supreme Court of the State of New York, and Francis T. P. Plimpton, Esq., President of The Association of the Bar of the City of New York, on August 6, 1968. The creation of the Committee followed upon the failure of the New York State Legislature to provide a screening procedure in connection with the large number of new judgeships it created at the 1968 Session (Ch. 987, L. 1968), and Governor Rockefeller's suggestion, in signing the bill, that the county leaders of the various political parties should exercise statesmanship to insure that those nominated for the new judgeships would be well qualified.

The Committee was an unofficial, informal group, broadly representative of the Bar and the community, created by agreement among Justice Botein, Mr. Plimpton, The Association of the Bar, and the leaders of the Democratic,

Republican and Liberal parties in the counties of the First Department. Its purpose was to assist the political leaders in deciding upon qualified candidates whom they would recommend to their respective conventions for nomination as Justices of the Supreme Court of the State of New York or, in the case of the Civil Court of the City of New York, to their respective parties' executive committees.

Under the provisions of the New York Election Law, these nominating conventions and executive committees of the political parties nominate candidates to fill judicial office, which candidates are then placed on the ballot at the next general election. The Committee's decisions clearly had no binding authority on the action of the nominating conventions or executive committees, nor did they in any way inhibit independent nominations of judges.

Petitioner commenced this proceeding on August 19, 1968, by service of a petition and notice of motion in the Supreme Court of the State of New York, County of New York. He sought a preliminary injunction against the activities of the Screening Committee, the political leaders, and members of the Board of Elections. On August 27, 1968, the Court denied the injunction and dismissed the petition. Its opinion recognized that the Screening Committee was not an official body, that its actions did not legally bind and did not control the activities of the nominating conventions, and that it did not affect the duties of the Board of Elections.

After its formation on August 6, 1968, the Screening Committee commenced its review of prospective candidates for the Supreme Court justiceships. Its findings were submitted to the respective political leaders on August 30, 1968. The nominating conventions of the various parties were held during the first week of September, 1968, and each party selected its candidates for the Supreme Court posi-

tions. These conventions demonstrated their independence by actually nominating several candidates whom the Screening Committee had found to be unqualified. Thereafter, on September 10, 1968, Justice Botein announced that the Committee had dissolved and would not pass on the qualifications of candidates for the Civil Court judgeships, as had been originally planned. (N. Y. Times, p. 35, col. 3 [Sept. 11, 1968]). Thereupon the Committee permanently disbanded. As a result, petitioner's claims against the Screening Committee clearly became moot.

Nevertheless, after being denied a stay by two judges of the New York appellate courts, petitioner declined to dismiss this proceeding voluntarily and perfected his appeal to the Appellate Division, First Department. After argument, that Court, without opinion, unanimously affirmed the lower court's order dismissing the proceeding and denying the injunction.

Subsequently, at the general election held on November 5, 1968, judges were elected to fill the Supreme and Civil Court positions created by the new statute. This election, as well as the dissolution of the Screening Committee, made this entire proceeding moot beyond peradventure.

Despite the election petitioner served a notice of appeal to the Court of Appeals of the State of New York. Respondents' motion to dismiss this appeal was granted on December 11, 1968 in the order under review herein. The Court's decision was based on two grounds:

(a) No substantial constitutional question was presented; and

(b) The appeal was moot.

Following the Court of Appeals' decision, petitioner moved for a stay here which was denied on December 31, 1968.

On January 1, 1969, those candidates elected at the general election held on November 5, 1968 assumed judicial office. They are presently sitting as judges on their respective courts. If petitioner wishes to question the right of any of these judges to hold office, it must be in a proceeding in which they have been made parties, and not in a proceeding, such as the instant one, which is clearly moot and based on utterly frivolous claims.

Reasons for Denying Certiorari

POINT I

The Questions Raised by Petitioner's Allegations are Moot.

Petitioner basically sought the following relief in the lower courts:

(1) An injunction against the Screening Committee and its members precluding them from taking any action with respect to the selection, nomination or election of judges under Sections 2, 14 and 17 of Chapter 987 of the Laws of 1968;

(2) An injunction against the participating political leaders restraining them from confirming, ratifying or suggesting the selection, nomination or election of any such judges; and

(3) A declaration that Sections 2, 14 and 17 of Chapter 987 of the Laws of 1968 are *pro tanto* unconstitutional.

As described above, the Screening Committee completed its review of prospective candidates for the Supreme Court justiceships, and submitted its findings to the respective political leaders on August 30, 1968. Thereafter, nominating conventions were held and each party selected its

candidates for the Supreme Court positions. On September 10, 1968, the Committee dissolved itself and, therefore, did not pass upon the qualifications of candidates for the Civil Court. At the general election held on November 5, 1968, candidates were elected to fill the new Supreme and Civil Court positions created by Chapter 987 of the Laws of 1968. The victorious candidates, who are not parties to this action, assumed their respective judicial offices on January 1, 1969, and are presently serving as judges in their respective courts.

As a result of the aforesaid election and the assumption of judicial office by the elected candidates, as well as the dissolution of the Screening Committee last September, petitioner's claims have clearly become moot. Because the Committee no longer exists, and has no further functions to perform, there is no way in which any relief could properly be provided in this proceeding. Accordingly, it is clearly unnecessary for this Court to burden itself by considering petitioner's various, largely fanciful, arguments.

This Court regularly denies a petition where the case is moot. *Zimmerman* v. *Walker,* 319 U. S. 744 (1943); *Tornello* v. *Hudspeth, Warden,* 318 U. S. 792 (1943). In *Richardson* v. *McChesney,* 218 U. S. 487 (1910), plaintiff sought to require the Secretary of the Commonwealth of Kentucky to act in a particular fashion with respect to the Congressional election scheduled to be held in November 1908. By the time the case reached this Court, the election was over. The Court accordingly held that the appeal was moot and dismissed the writ of error.

> "The election to be affected by a decree, according to the prayer of the bill has long since been held, and the members of Congress were, in November, 1908, elected under the apportionment act of 1900. They were, as we may judicially know, admitted to their

> respective seats, . . . The thing sought to be prevented has been done, and cannot be undone by any judicial action. Under such circumstances, there is nothing but a moot case. (Citations omitted)" 218 U. S. at 492.

Because this proceeding is moot, any decision rendered would be, in effect, a mere advisory opinion, a role this Court eschews. *United Public Workers* v. *Mitchell,* 330 U. S. 75, 89 (1947).

Inasmuch as the Screening Committee has been dissolved, and has no further duties or functions, an injunction restraining its activities would be useless. Similarly, the county political leaders and the Board of Elections have no functions at all with respect to the newly-elected judges which could be enjoined.

As was stated in *Doremus* v. *Board of Education,* 342 U. S. 429 (1952):

> "[T]his Court does not sit to decide arguments after events have put them to rest." 342 U. S. at 433.

See also *Coffman* v. *Breeze Corporations, Inc.*, 323 U. S. 316 (1945).

POINT II

The Petition Fails to Raise any Substantial Federal Question.

The burden is, of course, on petitioner to show that a substantial federal question has been properly raised in the prior state court proceedings. This federal question must be more than a mere formal one; it must not be so devoid of merit as to appear frivolous. Stern and Gressman, *Supreme Court Practice* § 3-25 (3d ed. 1962). An appeal or petition

will be dismissed where such question is not worthy of review. *Burke* v. *Oregon,* 279 U. S. 811 (1929); *Piedmont Power Co.* v. *Graham,* 253 U. S. 193 (1920). See Stern and Gressman, *supra.*

The petition in this case fails to meet these requirements and the guidelines for review set forth by Mr. Justice Brandeis in *Sugarman* v. *United States,* 249 U. S. 182, 183-4 (1919). It is a confused hodge-podge of alleged violations of various federal and state statutory and constitutional provisions and wholly fails to raise any substantial federal question. Not one of the thirteen New York judges who has passed on this proceeding has found any merit whatever in petitioner's position.

The only identifiable challenge to the constitutionality of any statute is petitioner's attack on the 1968 New York legislative provisions creating additional judgeships on the novel ground that, after the enactment of the statute, the Screening Committee was created, pursuant to an agreement, and that this latter private action in some manner invalidated the statute retrospectively. Such a contention is so clearly unsubstantial as to require no comment.

All of the other allegations in the petition are equally without merit. Regardless of the existence of the Screening Committee, the New York political leaders retained the same powers of persuasion with regard to judicial nominations as they had always exercised. Undoubtedly in the past they relied, at least in part, on the advice and recommendations of others, within or without their political party. Here they agreed to accept the recommendations of the Screening Committee, though, in some cases, this agreement was short-lived. The Committee itself merely reviewed the qualifications of the men whose names were submitted to it for evaluation, and notified only the particular leader who submitted the name of its recommenda-

tions with respect thereto. It could not prevent the nomination of other candidates by the nominating conventions or executive committees and did not interfere with the right of independent nomination.

Nor, of course, did this screening process interfere with anyone's right to vote at the general election in November. There is no basis for any claim that the activities of the Screening Committee deprived petitioner, or any other person, of his rights under the Federal or State Constitutions.

The allegations that freedom of speech and press were placed in jeopardy are almost ludicrous; no newspaper was interfered with, no candidate for judicial office was silenced. The state constitutional question which petitioner seeks to advance, that the inclusion of one or more justices on the Screening Committee violated Article VI, Section 20(b) of the New York Constitution, is without merit. In serving on this Committee, these justices did not assume "any other public office or trust." *People* v. *Hall,* 169 N. Y. 184, 62 N. E. 170 (1901); *People ex rel. Washington* v. *Nichols,* 52 N. Y. 478 (1873). They merely assisted in giving advice on the qualifications of candidates whose names were presented to them by the political leaders.

Petitioner's attack on the confidentiality of the screening process is misplaced and has no proper place in the petition. It is perfectly obvious that names would not have been submitted if those who might have been found unqualified would have had their names disclosed in the public press. In addition, the absolute candor required for impartial judgment is obtainable only in a private proceeding. In any event, the rejected candidates were, of course, not prevented in any way by this process from making public statements, if they chose to do so.

The patent lack of merit of the constitutional objections raised by the petition clearly mandates its denial. See *Abrams, et al.* v. *Van Schaick,* 293 U. S. 188 (1934).

CONCLUSION

The petition for a writ of certiorari to the Court of Appeals of the State of New York should be denied.

Respectfully submitted,

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